No. 12173.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IRVING L. BURSTEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

JAMES M. CARTER,
United States Attorney;
ERNEST A. TOLIN,
Chief Assistant U. S. Attorney;
NORMAN W. NEUKOM,
Assistant U. S. Attorney;
HERSCHEL E. CHAMPLIN,
Assistant U. S. Attorney,
600 Federal Building, Los Angeles 12,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Supplemental Statement.

Appellant in his reply brief on page two stated his intention to raise new matter as ground for error which was discussed therein for the first time. A consent was given therein for the appellee to file a reply brief, with the approval of the Court, in answer to new issues not raised in the appellant's opening brief.

In the statement of the case, appellant objects for the first time to the alleged error committed by the trial court in its failure to stop the appellant in his testimony concerning previous convictions. It is admitted therein that this is a matter of record in that the defendant testified

voluntarily of his prior convictions and therefore it was justified in the government's statement of the facts.

Under point two of said statement of facts, lines 9-11, it was stated that the record does not show that appellant ever refused to be represented by counsel. It is stated on lines 17-19 that the record further shows that no offer of the appointment of other counsel was ever made by the trial court. Reference is made to pages 29 and 30 of reporter's transcript. In discussing the matter of counsel in chambers during a recess in the trial, the court said in the presence of defendant, government counsel and the attorney appointed by the Court.

> "* * * While the defendant has stated in open court that you and he disagreed on proper defense to be put in this case in his behalf, he stated that he asked Judge Beaumont to be permitted to defend himself.
>
> "It happens that sometimes when a lawyer disagrees with his client, the court then at that time would offer him the opportunity of some other attorney to serve upon appointment of the court.
>
> "But, as you say now, he feels he could best defend himself in the case, without an attorney, that is his right. You cannot force an attorney on a defendant if he does not want him. He has that right and, under our laws, as I stated at the opening of the case, he has the right to defend himself without any attorney. * * * Of course, it is already before the jury that he prefers to defend himself. That is al-

ready there. * * * The defendant volunteered the statement, so the jury knows what the situation is, because the defendant advised the jury. So, with that state of the record, I do wish you could or would accept the appointment to assist him in whatever way you can and whatever assistance he might ask for."

On page 30 of said transcript, Mr. Weiner replied,

"I have already stated, your Honor, I can and I will. * * * Now, Mr. Burstein has definitely decided upon a course of preferring to proceed alone at the counsel table. If he wants to amend that position, I hold myself ready and, for the sake of the record, I reiterate I will assist him in whatever way I can."

Under point three of appellant's enlarged statement of facts, reference is made to the nature of the book here involved, the author's purpose in writing the book. It is argued under said statement of fact that Government's Exhibit "2," "Confessions of a Prostitute," which is the book under indictment here, had certain passages underlined in red pencil and that such was unfair and *prejudicial.*

Under the Summary of Argument, pages 7 and 9, the issue is raised for the first time by appellant in his reply brief as to the obscenity of the book in question and whether or not the trial court committed reversible error in its instructions on what matter is obscene within the meaning of the Statute.

Questions Involved.

1. Whether the Trial Court committed error in its definition of what constitutes obscene matter within the meaning of the statute?
2. Whether the Trial Court committed error in failing to restrain appellant from testifying as to prior convictions?
3. Whether the Court committed error in regard to underlines contained in Plaintiff's Exhibit 2?
   a. Whether appellant waived any objections thereto?
4. Whether the motive and purpose of the original author of the publication was material to appellant's defense?

Argument Summary.

The appellant urges upon appeal that the trial court committed reversible error in its instructions to the jury on the definition of obscene publications within the meaning of the statute. He cites cases in the District of Columbia and the Second Circuit as authority for the test and standard of obscenity that he advances. He sets forth this alleged error as his paramount point in his reply brief.

There is no merit to his position. There is an apparent conflict in authority on this rule of law according to recent decisions. Appellant's position is supported by the minority view which appears to find support in two eastern jurisdictions only. Such is not the law of this jurisdiction, nor the majority view. The instruction given

by the trial court in the present case is substantially in accord with the rule of the United States Supreme Court in so far as it has spoken on the test and standard of obscenity. Also, the test applied by the trial court is in accord with the prevailing Federal rule. Furthermore, it is the law of the Ninth Circuit and is substantially the test and standard applied in the *Magon* and *Duncan* cases hereinafter cited. The law of these two cases has not been changed in this jurisdiction since these opinions were handed down. It would appear from the court's instructions that they are taken almost entirely from these two cases. Therefore, it is submitted that the instruction given was a correct statement of the law, and that no error was committed in giving the complete definition of the meaning of obscenity as applied to publications within the meaning of the statute.

The point was urged by appellant that the original book from which the publication "Confessions of a Prostitute" was taken was written by a social worker. She compiled her studies and published the book "Sterile Sun" in order to jolt society into improving the conditions which it had brought about. The decisions hereinafter cited show that the purpose and motive of one who writes such a book is immaterial. Further, the cases hold that if the matter is obscene there is a violation of the statute if it is transmitted through the mail regardless of any good motive or purpose in so doing. Nothing appears in the record to show that appellant had any object or motive to better

society or supply his publication to social workers, scientists or doctors or contribute anything to literary progress.

If appellant's own test had been applied to the present case under instructions, there is an abundance of evidence that would have justified the jury in finding that the publication appealed more to the salacity of the reader than to any scientific, social or literary objective. It is undisputed that the trial court must first determine whether or not the publication could have the tendency to deprave the morals of the reader, and whether or not its dominant motive was to appeal to the lust and salacity or deprave the morals of the reader when taken as a whole. It is submitted that this publication could and did have the tendency to do so, thus outweighing any literary, scientific or medical value. On this point the jury has spoken, and the publication has been declared to have been obscene, lewd, lascivious and filthy as charged in the indictment. Therefore, the verdict of the jury and judgment of the trial court should not be disturbed. Upon review, the question is whether or not the trial court was in error in giving the case to the jury. It is only when there is no evidence by which the jury could have found an issue of fact that it will be disturbed upon appeal. The general rule is that where reasonable minds may differ and by reasonable judgment reach different conclusions as to the character of such writings, it is the duty of the court to submit the question to the jury. Such was properly done in this case.

A further point is raised by appellant that the trial court committed error in failing to restrain him from testifying about his prior convictions. The record will show that appellant conducted his own defense and took the stand to testify at his own request. It will show that he was eager to tell his life story which included prior convictions, one being of a similar offense in New York. The court committed no error in allowing defendant to conduct his defense in any manner he saw fit. Any objection to evidence which he introduced must be deemed as waived. Furthermore, it has been held in this jurisdiction that evidence of prior similar offenses may be shown to prove intent, state of mind, scheme or planning, and to negative any defense of accident or inadvertence. It goes without saying that a witness may be impeached by proof of a prior conviction. Therefore, it is submitted that no reversible error was committed by the court in this regard, and whatever error was committed by defendant cannot be complained of at this stage of the case.

Appellant further complains that the court committed error in allowing Plaintiff's Exhibit 2 to go to the jury wherein certain sentences were underlined by red pencil. The record discloses that the court gave a cautionary instruction to the jury about this exhibit, and pointed out that such red lines were not placed there by the court, and were not to be considered placed by defendant, but apparently had been drawn for the convenience of the Government only. The exhibit as a whole was submitted to

the jury for their consideration upon the stipulation of defendant and appellant at the time of the trial. He agreed to the stipulation that it might be submitted to the jury rather than read to them as is usually done when a document is received in evidence. Had appellant insisted that the exhibit be read to the jury obviously the red lines would have been unknown to them. Any objection which has been raised upon appeal for the first time to this alleged error must be considered as having been waived. Therefore, it is submitted that whatever error was committed was harmless error, and therefore, must be disregarded.

Appellant's major attack has been directed against the publication itself. However, it must be observed that he was convicted upon three other counts in addition to Count One which charged mailing of this publication. The three other counts refer to the publication, but each count charges a letter was sent to the prospective reader containing extracts from the publication. The extracts contain sufficient obscene, lewd, lascivious and filthy matter to justify a jury in finding that said letters were obscene independent of any reference to the publication itself. The judgment of the trial court should therefore be affirmed.

POINT I.

The Trial Court Committed No Error in Its Instructions to the Jury on the Definition and Test of Obscenity Within the Meaning of the Statute.

A. The Instruction Given Was a Correct Statement of Law and Was Not Reversible Error.

Appellant contends that the test of whether or not a publication is obscene is that set forth in *Walker v. Popenoe,* 149 F. 2d 511, at 512, C. A.-D. C., wherein it is stated that:

> "The standard must be the likelihood that the work will so much arouse the *salacity* of the reader to whom it is sent as to *outweigh* any literary, scientific or other merits it may have in that reader's hands."

The word salacity means that which is lustful, lewd, impure or lecherous as defined by McMillan's Modern Dictionary, revised edition 1947.

The case of *United States v. One Book Entitled Ulysses,* 72 F. 2d 705, Cal. App. 2d, is cited by appellant for the proposition that works of physiology, medicine, science and sex instruction are not within the statute, though to some extent and among some persons they may tend to promote lustful thoughts. (P. 707.) The Court goes on to point out that the same immunity should apply to literature as to science, where the presentation, when viewed objectively, is sincere, and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication. The question in each case is whether a publication taken as a whole has a *libidinous* effect.

The word libidinous means lewd, lascivious, and immoral. (McMillan's Dictionary, *supra.*)

The case of *Parmelee v. U. S.,* 113 F. 2d 729, C. A.-D. C. 2, is further relied upon by appellant for a correct standard and test by which it may be determined whether or not a certain publication falls within the prohibition of the statute.

The appellant relies heavily upon these above cases since he contends that they repudiate the doctrine of *Regina v. Hicklin,* L. R. 3 Q. B. 360, and that the instruction given by the trial judge in the present case, was similar to and based upon that English case. The *Parmelee* case contains a strong dissent. The *Ulysses* case (1934) from the Southern District of New York was a libel action against a book of fiction and likewise is weakened by a strong dissent.

The appellant at page 12 of his reply brief, contends that the Court makes it clear that the Supreme Court has never approved the test of the *Regina* case. He cites the case of *United States v. Levine,* 83 F. 2d 156 at 157 (C. C. A. 2, 1936), as authority for this proposition.

However, Circuit Judge Manton who wrote the dissent in the *Ulysses* case (1934) disagrees with appellant at page 710 of the opinion as follows:

> "Further the Supreme Court approved the test of the Hicklin Case. On page 43 of 151 U. S., 16 S. Ct. 434, 439, the court states:
>
> 'That was what the court did when it charged the jury that "the test of obscenity is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influence, and into whose hands a publication of this sort may fall. Would it," the court said, "suggest or

> convey lewd thoughts and lascivious thoughts to the young and inexperienced?" In view of the character of the paper, as an inspection of it will instantly disclose, the test prescribed for the jury was quite as liberal as the defendant had any right to demand.' "

The dissent further points out the views of the Supreme Court in *Dunlop v. U. S.,* 165 U. S. 486, 17 S. Ct. 375, 380, 41 L. Ed. 799, where it reviewed and approved a charge in a criminal case upon the subject of obscene publications.

If the rule of the *Regina v. Hicklin* case is substantially the same as the instruction to the jury in the present case, it appears from the above decisions that the U. S. Supreme Court is in full accord. Further it is pointed by the dissent in the *Ulysses* case that:

> "The tendency of the matter to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands the publications of this sort may fall, has become the test thoroughly entrenched in the federal courts. United States v. Bebout (D. C.) 28 F. 522; United States v. Wightman (D. C.), 29 F. 636; United States v. Clarke (D. C.), 38 F. 732; United States v. Smith (D. C.), 45 F. 476; Burton v. United States, 142 F. 57 (C. C. A. 8); United States v. Dennett, 39 F. (2d) 564, 76 A. L. R. 1092 (C. C. A. 2). What is the probable effect on the sense of decency of society, extending to the family made up of men, women, young boys, and girls, was said to be the test in United States v. Harmon (D. C.), 45 F. 414, 417."

What is claimed by appellant to be the law of the land is apparently the law in the District of Columbia and the Second Circuit only. The general rule of the Federal

Courts and the Supreme Court appears to be otherwise. Furthermore, the rule of the *Ulysses* case and that of the *Walker v. Popenoe* case is not binding on the Federal Courts of the Ninth Circuit. This Court, in the case of *Magon v. United States* (C. C. A. 9, 1918), 248 Fed. 201, 203, said:

> "In construing the word 'obscene,' as used therein, it has been uniformly held that, if the matter complained of were of such a nature as would tend to corrupt the morals of those whose minds are open to such influences by arousing or implanting in such minds lewd or lascivious thoughts or desires, it is within the prohibition of the statute, and that whether or not it had such tendency was a question for the jury. Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Knowles v. United States, 170 Fed. 409, 95 C. C. A. 579; United States v. Bennett, Fed. Cas. No. 14,571; McFadden v. United States, 165 Fed. 51, 91 C. C. A. 89; Demolli v. United States, 144 Fed. 363, 75 C. C. A. 365; United States v. Musgrave (D. C.), 160 Fed. 700; United States v. Harmon (D. C.), 45 Fed. 414; United States v. Clarke (D. C.), 38 Fed. 732."

Again in the later case of *Duncan v. United States* (C. C. A. 9, 1931), 48 F. 2d 128, at 132, the test applied by the trial court in the present case was restated by the Court to be the law of this jurisdiction as follows:

> "An elaborate discussion of that question we think entirely unnecessary because there is no serious disagreement in the authorities nor between the parties as to the law upon the subject. The test is as to whether or not the language alleged to be obscene would arouse lewd or lascivious thought in the minds of those hearing or reading the publication. * * *

> And our own more recent decision in *Magon v. U. S.*, 248 F. 201, 203, where it was said: 'In construing the word "obscene," as used therein, it has been uniformly held that, if the matter complained of were of such a nature as would tend to corrupt the morals of those whose minds are open to such influences by arousing or implanting in such minds lewd or lascivious thoughts or desires, it is within the prohibition of the statute, and that whether or not it had such tendency was a question for the jury.' (Citing numerous cases to which we refer.)"

The rule and test approved by our Ninth Circuit appears to be the law of the Eighth Circuit also.

In the case *Knowles v. United States,* 170 Fed. 409 (C. C. A. 8), 1909, the Court said,

> "The true test to determine whether a writing comes within the meaning of the statute is whether its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands it may fall, by arousing or implanting in such minds obscene, lewd, or lascivious thoughts or desires."

In 1909 the word filthy was added to the statute, Title 18, U. S. C. A. Section 334, in which every obscene, lewd or lascivious, and every filthy letter, writing, publication, pamphlet, or picture of an indecedent character was declared to be unmailable. "Filthy" means morally foul, polluted, nasty. *United States v. Davidson* (D. C.), 244 Fed. 523, 526. Dirty, vulgar, indecedent, offensive to the moral sense, morally depraving, debasing. *Tyomies Pub. Co. v. U. S.* (C. C. A.), 211 Fed. 385, 390; also Black's Law Dictionary.

In the *Limehouse* case (1932), *supra,* the Supreme Court at page 426 declared that it thought by the more natural reading of the clause to hold that Congress by the 1909 amendment added a new class of unmailable matter—the filthy.

B. It Was Immaterial Whether or Not the Author of the Original Book From Which the Publication in Question Was Taken Had Good Motives Directed Toward Social Reform.

It appears from the record [Rep. Tr. 35-36] that Appellant's Exhibit "A", the book entitled "Sterile Sun" was received in evidence over the government's objection.

In the case of *Knowles v. U. S.* (C. C. A. 8), 1909, 170 Fed. 409, 411, the defendant urged that his article contained a sincere discussion of an important social question, and that he was actuated only by the highest motives. His motive may have been ever so pure if the paper he mailed was obscene, he was guilty. There was no reference in the statute to the design or intent that a man has in depositing nonmailable matter in the mail. He cannot violate the law, even though his purpose be to accomplish good, so the Court held.

C. The Question of Whether or Not the Publication Was Obscene, Lewd, Lascivious and Filthy Was an Issue of Fact and Was Properly Submitted to the Jury.

As the Court stated in the *Knowles* case, 170 Fed. 409 at page 410, in all indictments under this statute there is a preliminary question for the Court to say whether the writing could be any reasonable judgment, be held to come within the prohibition of the law. It leaves a wide field for the sound, practical judgment of the jury to determine

the true character of the writing, and its probable effect upon the mind of readers. *Whenever reasonable minds might fairly reach different conclusions as to the character of the writings, it is the duty of the Court to submit the question to the jury. Rose v. United States,* 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *United States v. Bennett,* 16 Blatchf. 342, Fed. Cas. No. 14,571; *United States v. Davis* (C. C.), 38 Fed. 326; *United States v. Harmon* (D. C.), 45 Fed. 418.

D. By the Test Advanced by Appellant and Decisions Cited in Support Thereof, This Publication Was Obscene, Lascivious and Filthy.

Upon review the question is whether the trial court was correct in first deciding that the publication here could have the tendency to "arouse the salacity of the reader, so as to outweigh any literary, scientific or other merits it might have in his hands. (The test of the *Walker v. Popenoe* case, App. Rep. Br. p. 13.)

Is there not an abundance of evidence in the record that the publication, "Confessions of a Prostitute" could and did have a tendency to debase the morals of the reader—as opposed to any uplifting result? How could such matter fail to appeal to the salacity of the reader—as a question of fact? As such, it was the duty of the trial court to submit the issue to the jury. To them was properly left the true character of the writing and its probable effect upon the mind of readers.

We submit that the jury was correct in the present case and its verdict should not be disturbed.

E. No Error Was Committed by the Court in Regard to Plaintiff's Exhibit 2, Wherein Certain Passages Were Underlined.

The Court carefully pointed out to the jury that in Exhibit 2 certain sentences were underlined in red, but that they were not placed there by this Court. [Rep. Tr. 103.] Being evidently placed there at the convenience of the government, the jury was instructed that they must not believe that said red lines were placed there by defendant. However, defendant stipulated that said Exhibit 2, "Confessions of a Prostitute" need not be read to the jury (in which case the red lines would not have been seen by the jury or any emphasis added one way or the other), but that this exhibit would go to the jury with other exhibits for their consideration. [Rep. Tr. 102.]

Thus, any objections to having this exhibit seen by the jury rather than read to them, must be deemed to have been waived by appellant. Rule 52(a) provides that any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

The case of *United States v. Davidson,* 244 Fed. 523, at 528, cites with approval *United States v. Wyatt* (D. C.), 122 Fed. 316, wherein the Court charged the jury:

> "That a letter need not be obscene, lewd, or lascivious in each of its sentences or in all its parts in order to be an obscene, lewd or lascivious letter within the meaning of the statute. If it is obscene, lewd, or lascivious in one or more of its parts or sentences, or portions of sentences, it is an obscene, lewd or lascivious letter within the meaning of the statute."

POINT II.

The Court Committed No Reversible Error in Failing to Restrain Appellant in Telling the Jury of Other Similar Offenses.

A. Prior Similar Offenses Are Dismissible in Evidence to Prove Intent, State of Mind, Plan or Scheme.

Where intent, state of mind, or plan is an issue in any criminal case, the rule is well established in this jurisdiction that evidence of prior similar offenses may be received to show such intent and the absence of accident or inadvertence.

> *Henderson v. United States,* 143 F. 2d 681, at 683;
> *People v. Lisenba,* 14 Cal. 2d 403, 94 P. 2d 569, 579-584.

Such evidence was not admitted over appellant's objection, but upon his request, and in fact, he insisted on telling his complete life story and record of crime. He refers again to this similar conviction in New York of 1947 on page 1 of his opening brief. The rule of evidence is too well established to require authority, that a witness who testifies may be impeached by proof that he has been convicted of any felony or felonies.

B. The Judgment of the Trial Court Should Be Sustained Unless From a Review of the Entire Record and the Evidence, There Has Been a Miscarriage of Justice.

This Court said in *Henderson v. United States,* 143 F. 2d 681 (C. C. A. 9, 1944), at page 682:

> "It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction,

will consider the evidence most favorable to the prosecution. United States v. Manton, 2 Cir., 107 F. 2d 834, 839; Shannabarger v. United States, 8 Cir., 99 F. 2d 957, 961; Borgia v. United States, 9 Cir., 78 F. 2d 550, 555. * * *"

Conclusion.

The trial court applied the true test and standard in its instructions to the jury on the definition of what matter is obscene within the meaning of the statute. The instruction was in accord and based upon the prevailing rule of law in this jurisdiction. There is no good and sufficient reason to adopt the minority view now. Whatever new objections to alleged errors of the trial court were waived by appellant as the record demonstrates. If any error were committed it was either harmless, or it was in appellant's favor, in which case either it must be disregarded, as he is in no position to complain.

It is a well founded rule that every reasonable presumption will be indulged in favor of the rulings of a trial court. If all permissible inferences are drawn from the record in this case, the evidence is amply sufficient to sustain the conviction. Therefore, the judgment should be affirmed.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney;
ERNEST A. TOLIN,
Chief Assistant U. S. Attorney;
NORMAN W. NEUKOM,
Assistant U. S. Attorney;
HERSCHEL E. CHAMPLIN,
Assistant U. S. Attorney,
Attorneys for Appellee.